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Supreme Court, U.S.
FILED
AUG 12 1997
CLERK

No. 96-568

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

JOSEPH ONCALE,

*Petitioner,*

vs.

SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN, and BRANDON JOHNSON,

*Respondents.*

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

## BRIEF OF NATIONAL ORGANIZATION ON MALE SEXUAL VICTIMIZATION, INC.; MEN STOPPING RAPE, INC.; OAKLAND MEN'S PROJECT, INC.; MEN AGAINST PORNOGRAPHY; SEXUAL EXPLOITATION EDUCATION PROJECT, INC.; MEN OVERCOMING SEXUAL ASSAULT (a project of BAY AREA WOMEN AGAINST RAPE, INC.); STOP PRISONER RAPE, INC.; MEN OVERCOMING VIOLENCE, INC.; COMMUNITY UNITED AGAINST VIOLENCE, INC.; EMERGE: A MEN'S COUNSELING SERVICE ON DOMESTIC VIOLENCE, INC.; MEN STOPPING VIOLENCE, INC.; MEN'S RAPE PREVENTION PROJECT, INC.; NEW YORK CITY GAY & LESBIAN ANTI-VIOLENCE PROJECT, INC.; and NATIONAL COALITION AGAINST SEXUAL ASSAULT, INC., as Amici Curiae in Support of Petitioner

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## STATEMENT OF INTEREST OF *AMICI CURIAE*

Pursuant to Rule 37 of the Rules of the Supreme Court,[1] *Amici Curiae* herein file this brief in support of petitioner, Joseph Oncale.

*Amici Curiae* National Organization on Male Sexual Victimization, Men Stopping Rape, Oakland Men's Project, Men Against Pornography, Sexual Exploitation Education Project, Men Overcoming Sexual Assault (a project of Bay Area Women Against Rape), Stop Prisoner Rape, Men Overcoming Violence, Community United Against Violence, Emerge: A Men's Counseling Service on Domestic Violence, Men Stopping Violence, Men's Rape Prevention Project, New York City Gay & Lesbian Anti-Violence Project, and National Coalition Against Sexual Assault are organizations dedicated to ending sexual violence. Many provide professional services to male survivors of sexual abuse by other men. Some of the groups include men who have been sexually assaulted by other men. Most *amici* engage in community education and other expert activities, policy consultation, and activism. All share an interest in advancing principles of sex equality to redress and prevent sexual assault and related social patterns of sex-based subordination.

*Amici* recognize that when women and men are sexually violated, verbally or physically, they are targeted and harmed as women and as men. *Amici* are united in the view that same-sex sexual harassment, no less than opposite-sex sexual harassment, violates civil rights to sex equality under law. They believe that citizens should have a right to seek redress of such injuries.

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[1] Letters from both parties consenting to the filing of this brief have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part. No person or entity other than *amici* or their counsel made a monetary contribution to its preparation, production, and submission.

Through their experiences and work, *amici* have learned that sexual abuse of men by men is a serious and neglected social problem inextricably connected to sexual abuse of women by men. Male sexual aggression has widespread negative effects and deep roots in sex inequality in society. *Amici* believe that perpetrators of sexual harassment should derive no legal immunity from the gender of their victims. *Amici* thus share an interest in the legal recognition of Joseph Oncale's right to sue for sexual harassment by his male superiors as sex discrimination under Title VII.

Statements describing each amicus organization more specifically may be found at App. A.

## STATEMENT OF FACTS

Joseph Oncale was employed from August to November of 1991 by Sundowner Offshore Services, Inc., as a roustabout on an oil rig in the sea for $7 an hour, seven days on, seven days off. E.E.O.C. Affidavit, Chg #270920368 (December 5, 1991) ("Aff."). It was a dangerous, isolated job in an all-male environment. Oncale Dep., Jan. 20, 1995 at 69. ("Dep.") As accepted on this motion, three men sexually harassed him there: John Lyons, his Sundowner supervisor, and Danny Pippen and Brandon Johnson, two Sundowner coworkers.

John Lyons began his sexual advances and sexual objectification of Oncale early in his employment. Dep. at 40:8-9 ("You know you got a cute little ass, boy"). Lyons said he was going to "fuck me in my behind." Aff. at 1. He threatened to rape him. Dep. at 41-42. ("'If I don't get you now, I'll get you later. I'm going to get you. You're going to give it to me'... [H]e said that I would have sex with him before it was over" at 42.) Such remarks were constant.

On October 25, 1991, Oncale was first sexually attacked physically. Aff. at 1. Pippen grabbed him, pulled him down, and held him immobile in a squatting position on his knees while Lyons unzipped his pants, pulled out his penis, and stuck it onto the back of Oncale's head. Dep. at 49-52. Oncale asked them to quit. Dep. at 53:2-3. Lyons and Pippen



laughed. Dep. at 53:8-9. Oncale later that day learned that most of his coworkers had seen the assault. Dep. at 53:2-3; Aff. at 2.

The next day, Brandon Johnson chose a dangerous moment on the job to grab Oncale and force him to the ground again. Dep. at 55. Lyons pulled his penis out and put it on Oncale's arm. Dep. at 57. Oncale complained to superiors. Aff. at 1.

That same night, Lyons and Pippen attempted to rape Oncale as he was taking a shower. Pippen grabbed him, lifting him off the ground by the knees, while "John Lyons grabs the bar of soap and rubbed it between the cheeks of my ass and tells me, you know, they're fixing to fuck me...." Dep. at 58. Oncale struggled and got away. Dep. at 60. He believed the intentions of Lyons were "to rape me" and those of Pippen were "to assist and/or help...rape me, too." Dep. at 72.

Oncale complained further and tried to arrange to get off the oil rig. The sexual advances and sexual threats continued. John Lyons said: "You told your daddy, huh? Well, it ain't going to do you no good because I'm going to fuck you anyway." Dep. at 74. Oncale "felt that if I didn't leave my job, that I would be raped or forced to have sex...that if I didn't get off the rig, that I would be sexually violated." Dep. at 73.

Oncale continued to try to work but "couldn't sleep because I was afraid that they would do something to me, I couldn't fight, and I felt disgraced." Aff. at 2. Oncale quit soon thereafter, stating on his pink slip that he "voluntarily left due to sexual harassment and verbal abuse." Aff. at Attachment 1. On December 5, 1991, he filed a complaint for sexual harassment with the E.E.O.C. His suit for sex discrimination under Title VII complained of both hostile environment and *quid pro quo* sexual harassment, *Complaint for Damages*, CA No. 94-1483 (E.D. La. 1994): "I felt that it was almost to a point where it was my livelihood." Dep. at 43.

In 1993, Oncale began experiencing severe panic attacks and other episodes of long-term post-traumatic stress. Dep. at 21. He became dizzy, numb in his hands, and had a rapid

heartbeat, which symptoms he continues to attempt to control and treat with medication and counseling. Dep. at 20-21.

## SUMMARY OF ARGUMENT

Men raping men is a serious and neglected social problem with deep roots in gender inequality. Courts generally permit men who have been sexually assaulted and otherwise sexually harassed by other men at work to sue under Title VII of the Civil Rights Act of 1964, as women can. The Fifth Circuit decision under review is a pernicious legal anomaly, categorically precluding equality relief on summary disposition simply because the victim and victimizer are of the same sex. Its double standard of gender justice denies men rights because they are men—with negative implications for gay and lesbian rights as well, as exemplified by the related Fourth Circuit approach, under which heterosexual perpetrators may commit acts for which homosexual perpetrators are held legally responsible. These decisions make accountability for sex discrimination turn on who one is, not on what is done.

The better approach advanced by *amici*, building on the vast body of judicial precedent, is not abstract but concrete. Whether an assault is "because of sex," triggering Title VII, is a factual determination. Other legal requisites being met, if acts are sexual and hurt one sex, they are sex-based, regardless of the gender and sexual orientation of the parties.

The Fifth Circuit decision at bar is bottomed on misconceptions about the gendered nature of the sexual abuse of men, particularly its connections to the inequality of women to men and of gays and lesbians to heterosexuals. Male rape—whether the victim is male or female—is an act of male dominance, marking such acts as obviously gender-based and making access to sex equality rights for Joseph Oncale indisputable.

The Equal Protection Clause of the Fourteenth Amendment, as well as clear statutory principles, requires recognizing same-sex sexual assault as unquestionably actionable as sex discrimination under Title VII as a matter of law. The



decision of the Fifth Circuit in this case must accordingly be reversed.

## ARGUMENT

### INTRODUCTION

The Fifth Circuit stands alone in precluding Title VII access for same-sex sexual harassment. Every other circuit that has considered the question, whether in rulings, *Doe v. City of Belleville*, No. 95-3634, 1997 WL 400219, at *9 (7th Cir. July 17, 1997) ("*Doe*"); *Fredette v. BVP Management Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997); *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 448 (6th Cir. 1997); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 141 (4th Cir. 1996), *but cf. McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1196 (4th Cir.), *cert. denied*, 117 S. Ct. 72 (1996); *Quick v. Donaldson Co. Inc.*, 90 F.3d 1372, 1379 (8th Cir. 1994), or in dicta, *e.g.*, *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 148 (2d Cir. 1993) (Van Graafeiland, J., concurring), *cert. denied*, 510 U.S. 1164 (1994); *Vinson v. Taylor*, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., with whom Scalia and Starr, JJ., join, dissenting from denial of rehearing *en banc*); *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977); *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1047 n.4 (3d Cir. 1977), has found some allegations of harassment of men by men to state legally sufficient claims under Title VII's sex discrimination prohibition. *See also Fleenor v. Hewitt Soap Co.*, 81 F.3d 48, 49 (6th Cir.), *cert. denied*, 117 S. Ct. 170 (1996); *Purrington v. Univ. of Utah*, 996 F.2d 1025, 1028-31 (10th Cir. 1993); *Morgan v. Mass. Gen. Hosp.*, 901 F.2d 186, 192-193 (1st Cir. 1990).

The foundation of *Oncale* and fountainhead of its legal error is *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988). *Goluszek* held that while women sexually harassed by men have a Title VII remedy, because women are unequal to men at work, men sexually harassed by men have none, because an

all-male male-dominated environment cannot discriminate against a man as a man. Sexually victimized men are thus denied access to civil rights remedies when other men sexually violate or demean them at work in circumstances in which identically situated women have clear claims.

Repudiated in its own circuit by *Doe* at *9, and by every other Court of Appeals that has considered it, *Fredette*, 112 F.3d at 1509; *Hopkins v. Balto. Gas & Elec. Co.*, 77 F.3d 745, 751 (4th Cir.) (Niemeyer, J.), *cert. denied*, 117 S. Ct. 70 (1996), and by a number of district courts, *see, e.g.*, *Miller v. Vesta, Inc.*, 946 F. Supp. 697, 704 (E.D. Wisc. 1996); *King v. M. R. Brown, Inc.*, 911 F. Supp. 161, 167 (E.D. Pa. 1995), the *Goluszek* opinion was nevertheless relied upon by the Fifth Circuit in its decision in *Garcia v. Elf Atochem North America*, 28 F.3d 446 (5th Cir. 1994), to summarily rule that a man who was sexually attacked by a man on his job could not sue under Title VII. *Garcia*'s only other authority was an unpublished Fifth Circuit ruling, *Giddens v. Shell Oil Co.*, 12 F.3d 208 (5th Cir.) (Table), *cert. denied*, 513 U.S. 925 (1994), which analyzed the issue in three sentences with no citations. *Giddens v. Shell Oil Co.*, No. 92-08533 (5th Cir. Dec. 6, 1993). (*See* App. B for full text.) *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 119-120 (5th Cir. 1996), *cert. granted*, 138 L.Ed. 2d 192 (1997), "in what can only be described as a lukewarm endorsement," *Caldwell v. KFC Corp.*, 958 F. Supp. 962, 968 n.3 (D.N.J. 1997), affirmed *Garcia* as precedent, leading to the present petition.

The many courts that have recognized the actionability of same-sex harassment claims before and since *Goluszek* have relied on the plain language of the statute, the clear weight of authority in sexual harassment cases, and deference to E.E.O.C. guidelines. They have used simple logic, equality principle, life experience, and common sense. The handful of courts that has refused to recognize the claim—principally district courts in circuits that have since allowed it, *see, e.g.*, *Benekritis v. Johnson*, 882 F. Supp. 521, 526 (D.S.C. 1995); *Torres v. Nat'l Precision Blanking*, 943 F. Supp. 952, 953 (N.D. Ill. 1996)—rely on *Goluszek*. *See Ton v. Information*



*Resources, Inc.*, 70 F.E.P. Cases 355, 360 (N.D. Ill. 1996) (tracing impact and criticisms of *Goluszek*).

## I. SEXUAL ABUSE OF MEN BY MEN IS A SERIOUS SOCIAL PROBLEM OF GENDER INEQUALITY.

*Amici*—as survivors of and experts on male-on-male sexual abuse—submit that *Goluszek*, hence the Fifth Circuit reliance on it, incorrectly analyzed the sexual abuse of men by men. Men *are* discriminated against based on their sex when sexually aggressed against by other men. They are targeted as men—usually as certain kinds of men—to be victimized through their masculinity, violated in their minds and bodies as individual members of their gender, as gender is socially defined.

### A. Male Dominance in Society Includes Sexual Dominance of Some Men Over Other Men as Well as Over Women.

Anthony Goluszek's male coworkers verbally tormented him in sexually explicit ways, demeaned his adequacy as a man, accused him of being gay or bisexual based on his reticence to have or discuss an interest in "fucking" women, and poked his buttocks with a stick. *Goluszek*, 697 F. Supp. at 1454. Nonetheless the *Goluszek* court ruled that he was not discriminated against based on his sex because the purpose of Title VII is to redress "an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group[,]" namely women. *Id.* at 1456. Because Goluszek was "a male in a male-dominated environment," *id.*, he could not, the court found, have suffered an environment "that treated males as inferior[.]" *Id.* Conceding that Goluszek "may have been harassed 'because' he is a male," *id.*, the court nonetheless dismissed his claims because the acts complained of could not have created "an anti-male environment" for him at work. *Id.*

Goluszek's workplace was unmistakably a male-dominated environment. This Court has observed that they exist. *See,*

*e.g., Kahn v. Shevin*, 416 U.S. 351, 353 (1974) (noting "the socialization process of a male-dominated culture" as source of women's poverty); *Dothard v. Rawlinson*, 433 U.S. 321, 334-335 (1977) (women excluded from contact jobs in male-only prisons due to atmosphere of violence against men). Sex segregation combined with gender hierarchy in the workforce ensures that many, perhaps most workplaces are dominated by men, in numbers or power or both. *See generally* THE GLASS CEILING COMMISSION, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL (1995). Sex integration addresses the sex-discriminatory composition of all-male environments, *see, e.g., United States v. Virginia*, 116 S. Ct. 2264 (1996), but the sex-discriminatory norms long endemic to such settings—under which men may sexually victimize others—must also be addressed to make sex equality real.

*Amici* strongly agree with the *Goluszek* court that Title VII—certainly as amended and interpreted over time—is aimed at rectifying sex-based power imbalances and stopping male abuses of power in the workplace. But men abuse male power over other men as well as over women. To conclude, from the fact that women are differentially sexually abused at work, that men who are sexually abused are not abused as men, and should have no Title VII relief, reflects not only faulty analysis but false assumptions, misreadings,[2] and incomplete information.

The *Goluszek* opinion displays several common myths about male-on-male sexual abuse with which *amici* are familiar in their work: that men, acting as members of their gender, cannot and do not dominate other men as well as

[2] The note cited in *Goluszek* attributes the "disproportionate exposure of women to heterosexual sexual harassment" to the "historically inferior position of women in a male-dominated work force" to justify its own valid focus on sexual harassment of men by women. Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1467 n.1 (1984). The note does not say or imply that male-on-male sexual harassment is not actionable.



women; that when a man sexually abuses another man, the actions are not sexual and not gender-based; and that male domination of some men over other men is not part of the social system whereby men dominate women.

In the world of *Goluszek*, men in all-male environments do not oppress other men in sex-specific ways. As one district court, in following *Goluszek*, put it: "This theory focuses on whether there is an atmosphere of oppression by a 'dominant gender,' and thus assumes that the harasser and victim must be of opposing genders." *Martin v. Norfolk S. Ry.*, 926 F. Supp. 1044, 1049 (N.D. Ala. 1996). Masculinity is assumed to be uniform, gender making all men sufficiently equal to one another that no man can be in a significant position of powerlessness relative to another man. But as study after study has shown, all-male environments are frequently characterized by extreme hierarchy well-documented to breed sexual abuse of men by men, whether from "a sense of macho competition, violence as a rite of passage, an expression of dominant status, or an initiation of hazing." MICHAEL SCARCE, MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME 35 (1997) ("*Scarce*") (14 studies reviewed at 11-34).

Men are most often raped by other men when there are no women around: in prisons, in confined and isolated work sites, in men's schools and colleges, in the military, in athletics, in fraternities. Michael B. King, *Male Rape in Institutional Settings*, in MALE VICTIMS OF SEXUAL ASSAULT 67 (Gillian C. Mezey & Michael B. King eds., 1992). Men sexually abuse those they have power over in society: first, women and children; then other men, typically on the basis of their status as men of a particular age, Dep. at 4:6 (age 21); physical stature, Dep. at 59:25 (weight of "125, 135"); ethnicity, *Goluszek*, 697 F. Supp. at 1453 (Polish); race, *Scarce*, at 18 (African-American men disproportionately victimized); disability, *McWilliams* 72 F.3d at 1193 (learning disability), *Ward v. Ridley Sch. Dist.*, 940 F. Supp. 810, 811 (E.D. Pa. 1996) (mentally retarded); or sexual orientation, perceived, *Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at *7 (6th Cir.

Jan. 15, 1992), or actual, *Nabozny v. Podlesny*, 92 F.3d 446, 451 (7th Cir. 1996), that makes them attractive for, or vulnerable to, male sexual aggression.

The *Goluszek* court held that a man cannot be made inferior as a man in an all-male setting. But both Goluszek and Oncale were treated as inferior men in very standard ways—Oncale more violently. Oncale's attackers were asserting male dominance through imposing sex on a man with less power. Men who are sexually assaulted are thereby stripped of their social status as men. They are feminized: made to serve the function and play the role customarily assigned to women as men's social inferiors. In terms that apply to male-on-male rape generally, Susan Brownmiller analyzes prison rape of men as "an acting out of power roles within an all-male, authoritarian environment in which the weaker, younger inmate...is forced to play the role that in the outside world is assigned to women." SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 258 (1975). This lowers the victim's status, making him inferior as a man by social standards. For a man to be sexually attacked, by placing him in a woman's role, demeans his masculinity; he loses it, so to speak. This cannot be done to a woman. What he loses, he loses through gender, as a man. *See generally* Jim Struve, *Dancing With the Patriarchy: The Politics of Sexual Abuse*, in THE SEXUALLY ABUSED MALE 3 (Mic Hunter, ed., 1990).

Often it is men perceived not to conform to stereotyped gender roles who are the targets of male sexual aggression. Goluszek was taunted for appearing unwilling to oppress women sexually. Because he did not conform to his male coworkers' view of what his gender behavior ought to be, because he was not seen to be practicing sexual objectification and subordination of women, he was seen as less a man according to their sex-stereotyped standards. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (sex stereotyping actionable as sex discrimination). *See generally* JOHN STOLTENBERG, REFUSING TO BE A MAN 41-56 (1989). Goluszek was punished, ostracized, insulted, and forced to consume pornography to make him conform to their



stereotype of how a man should be a man by subordinating women sexually. He was subjected to homophobic slurs reflecting the common assumption that if he is not "fucking" a woman, he is no longer a man as male supremacy defines it. "Having his gender questioned," *Doe* at *4, marked Goluszek's abuse as sex-based. Title VII's goal of "strik[ing] at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes," *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) (part quoted with approval in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986)), clearly intercepts such acts.

The reading of Title VII by *Goluszek* and its progeny did nothing for women except use their powerlessness to justify doing nothing for relatively powerless men. The errors in *Oncale* predicated upon it should not be followed by this Court.

### B. Denial of Sex and Gender in Male-on-Male Sexual Abuse Maintains Male Dominance.

The gravamen of *Goluszek* is that male same-sex aggression is not gendered in the sense Title VII requires. Implicit is an insistence that men cannot be sexually dominated in their social status or roles *as men*. The denial that interactions among men can have a sexual component, and that sexual abuse of men is gendered, are twin features of the social ideology of male dominance with which *amici* are familiar as experts. In this ideology, men are seen as sexually invulnerable. This image protects men from much male sexual violence and naturalizes the sexual abuse of women, making it seem that women, biologically, are sexual victims. Denying that men can be sexually abused as men thus supports the gender hierarchy of men over women in society. The illusion is preserved that men are sexually inviolable, hence naturally superior, as the sexual abuse of men by men is kept invisible. *See* Fred Pelka, *Raped: A Male Survivor Breaks His Silence*, ON THE ISSUES, Spring 1992, at 8.

Accordingly, some courts jump to de-sexualize and de-gender male-on-male sexual aggression. In denying access to

equality relief, they call the behavior at issue "horseplay," *McWilliams*, 72 F.3d at 1194; "mere locker room antics," *Tietgen v. Brown's Westminster Motors, Inc.*, 921 F. Supp. 1495, 1501 (E.D. Va. 1996) (allowing same-sex suit); being "razzed," *Vandeventer v. Wabash Nat'l Corp.*, 867 F. Supp. 790, 796 (N.D. Ind. 1994), *rev'd*, 887 F. Supp. 1178 (N.D. Ind. 1995); and "a personal grudge match," *Johnson v. Hondo, Inc.*, 940 F. Supp. 1403, 1410 (E.D. Wisc. 1996). They pass it off as "puerile and repulsive," *McWilliams*, 72 F.3d at 1196; "diffuse" and "ambiguous," *Hopkins*, 77 F.3d at 753; "offensive and tasteless," *id.* at 755; obsessive, insecure, vulgar, insensitive, and mean, *McWilliams*, 72 F.3d at 1196; "crude and offensive," *Mayo v. Kiwest Corporation*, 898 F. Supp. 335, 337 (E.D. Va. 1995); "physically violent and sadistic...malevolence and spite," *Melnychenko v. 84 Lumber Co.*, 424 Mass. 285, 287 n.4, 676 N.E. 2d 45, 47 n.4 (Mass. 1997) (from lower court decision); "cretinous," *Callanan v. Runyun*, 75 F.3d 1293, 1298 n.5 (8th Cir. 1996), and "trash talk," *Blueford v. Prunty*, 108 F.3d 251, 254 (9th Cir. 1997). The point is to call the behavior anything but sexual and attribute it to anything but gender. Amazingly, even gender is used to deny gender, for example, "boys will be boys"—a gendered description if ever there was one—being considered *not* gender-based. *Seamons v. Snow*, 84 F.3d 1226, 1240, 1241 (10th Cir. 1996). That the behavior described may be everything these courts say it is does not mean that it is not sexual and gendered, hence sex-based.

Denial that sexual abuse of men by men is sexual in nature is a common feature of male dominance. When a man's testicles are aggressively grabbed, it takes a lot to deny that the attack has something to do with the fact he is a man, but the district court managed it in *Quick v. Donaldson Co., Inc.* 895 F. Supp. 1288 (S.D. Ia. 1995), *rev'd*, 90 F.3d 1372 (8th Cir. 1996). Attacks focused on male sexual organs are sexual attacks, hence sexual. With the Seventh Circuit, "frankly, we find it hard to think of a situation in which someone intentionally grabs another's testicles for reasons entirely unrelated to that person's gender." *Doe* at *15. Similarly, when men rub another man's penis until it becomes erect, blindfold him and



force him to his knees and put their fingers into his mouth in simulated fellatio, expose their genitals to him, put a broom handle between his buttocks, ask him for sex, offer to pay him money for sex, unzip their fly and invite him into a restroom stall, flick their tongue and say "I love you" while sex is discussed, *see McWilliams*, 72 F.3d at 1198-99 (Michael, J., dissenting) (facts), powerful denial is required to deem the conduct anything but sexual. But, in *McWilliams*, because the perpetrators "were" heterosexual, the Fourth Circuit imagined this aggression to be

> "because of" the victim's known or believed prudery, or shyness, or other form of vulnerability to sexually-focussed speech or conduct. Perhaps "because of" the perpetrators' own sexual perversion, or obsession, or insecurity. Certainly, "because of" their vulgarity and insensitivity and meanness of spirit. But not specifically "because of the victim's *sex*.

*Id.* at 1196 (italics in original). None of the conjectured motivations excludes gender as the driving force in all of them. Moreover, motivation need not be exclusively gender-based to be actionably gender-based. *Price Waterhouse*, 490 U.S. at 241 (under Title VII mix of gender and other motives is "because of sex") (plurality). *See also* Civil Rights Act of 1991, §107(a), 42 U.S.C. §2000e-2(m) 105 Stat. 1074-1076 (1994).

Moral disapprobation is no substitute for equality analysis and legal accountability. The acts against Mr. McWilliams were neither gender-neutral nor indiscriminate; they asserted male dominance. He was targeted as a man, a certain kind of man the court described as having "arrested ... cognitive and emotional development." 72 F.3d at 1193. "Men's rape of women is a hateful act designed to reinforce male supremacy. So is men's rape of men." Rus Ervin Funk, *Men Who Are Raped*, in *Scarce*, at 222. He was abused as women are so often abused—except that women, when their sexuality hence

their gender is assailed by men at work, have a Title VII remedy.

## II. SEXUAL HARASSMENT OF MEN BY MEN IS SEX-BASED ABUSE UNDER SEX EQUALITY GUARANTEES AS A MATTER OF LAW.

### A. Sex Discrimination Law, Hence Sexual Harassment Law, Protects Both Sexes.

Sexual harassment is legally recognized as a form of sex-based discrimination. There is no question that both Title VII and the Equal Protection Clause of the Fourteenth Amendment, under which sexual harassment is also actionable, *Bohen v. City of East Chicago*, 799 F.2d 1180, 1185 (7th Cir. 1986); *Pontarelli v. Stone*, 930 F.2d 104, 113-14 (1st Cir. 1991), protect both sexes equally, even if, due to gender inequality in society, these provisions, as applied, do not always affect the sexes in precisely the same way.

The plain language of Title VII protects all individuals from sex discrimination: "It shall be an unlawful employment practice for an employer...to discriminate against any individual with respect to his...terms, conditions, or privileges of employment, because of such individual's...sex...." 42 U.S.C. §2000e-2(a)(1) 78 Stat. 255 (1994). In deciding that this prohibition on discrimination "because of such individual's sex" applied to men, this Court stated: "Male as well as female employees are protected against discrimination." *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 682 (1983).

Other than in the *Goluszek* line of cases, sexual harassment law has uniformly followed the same rule for over twenty years, prohibiting unequal sexual predation at work regardless of the gender of the parties. *See Tomkins*, 568 F.2d at 1047 n.4; *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982) (quoted with approval in *Meritor*, 477 U.S. at 66-67.) As the Ninth Circuit put this principle: "*all* individuals—male or female—belong to a 'protected' group for purposes of



determining discrimination on the basis of their sex." *Nichols v. Frank*, 42 F.3d 503, 511 (9th Cir. 1994) (emphasis in original). Just as men unquestionably can bring Title VII claims when sexually harassed by women, *Huebschen v. Dep't of Health and Soc. Servs.*, 716 F.2d 1167, 1172 (7th Cir. 1983), and women when sexually harassed by men, nothing except *Goluszek* and the Fifth Circuit says that men cannot bring the same claims women can bring, including claims against men.

No one has legal *carte blanche* to discriminate against members of their own racial or gender group. *See Walker v. IRS*, 713 F. Supp. 403 (N.D. Ga. 1989). Nor does any basic principle of equality law or the Supreme Court's recognition of the claim for a sexually hostile working environment restrict the relief available to survivors based on the gender of discriminator or victim. *King v. Town of Hanover*, 959 F. Supp. 62, 66 (D.N.H. 1996), *aff'd. on other grounds*, 116 F.3d 965 (1st Cir. 1997). As noted by the Eleventh Circuit in ruling that same-sex harassment is actionable under Title VII, "There is simply no suggestion in these statutory terms that the cause of action is limited to opposite gender contexts." *Fredette*, 112 F.3d at 1505. *Accord Caldwell*, 958 F.Supp. at 968.

Title VII and the protections of the Constitution's Equal Protection Clause, as interpreted, form a single body of equality law on this point. Not only is the standard of review for women and men the same, *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723 & n.8 (1982), but this Court's basic sex equality doctrine has been largely built in cases of men seeking sex equality rights, *see, e.g., Orr v. Orr*, 440 U.S. 268 (1979); *Craig v. Boren*, 429 U.S. 190 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), to choose only a few.

Equality rights, while based on group membership, are personal rights. *Shelley v. Kramer*, 334 U.S. 1, 22 (1948). "The neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals[.]" *J.E.B. v. Alabama*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring) (males excluded from jury service

because of gender violates equal protection); *see also Connecticut v. Teal*, 457 U.S. 440, 455-56 (1982). While the Constitution, like Title VII, is rightly concerned for members of groups who have traditionally been subjected to systematic discrimination, it has never confined individual access to equality relief to members of such groups. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Individual men may need equality rights particularly when, as here, their situation is exceptional among men and/or they are in situations in which women, as members of the subordinated gender group, are more typically found. *See, e.g., Weinberger, supra* (widower father caring for newborn baby at home); *Hogan, supra* (man seeking admission to nursing school).

### B. Same-Sex Harassment Is Facially Sex-Based When It Is Sexual and One Sex Is Victimized.

To be actionable as sex discrimination, an impugned behavior must be "because of sex." When a man sexually harasses another man, how do we know it was "because of sex"?

Drawing on over twenty years of judicial development of the legal claim for sexual harassment, the answer is the same for men as for women, for gay men and lesbian women as for heterosexual women and men. It is a question of fact. For purposes of motions testing the legal sufficiency of sexual harassment claims, sexual allegations are facially gender-based. When, in addition, one sex is disadvantaged, sex-based discrimination is unambiguously claimed as a matter of law.

#### 1. Whether Alleged Acts Are "Based on Sex" Is a Question of Fact.

The first two appellate cases to establish the legal claim for sexual harassment, *Barnes, supra* (*quid pro quo*), and *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981) (hostile environment), took the view that whether or not behavior was sex-based under Title VII was a question of fact. To overcome motions to dismiss arguing that sexual harassment of a woman by a man was not sex-based as a matter of law



because the same thing could have been done to a man, the D.C. Circuit thought that what mattered was not what could have been done but what *was* done.

Thus, in *Barnes*, the D.C. Circuit held: "But for her womanhood, *from aught that appears*, her participation in sexual activity would never have been solicited...." *Barnes*, 561 F.2d at 990 (emphasis added). Sticking to facts circumvented the sophistic argument that because sexual harassment could be done to either or both sexes, it was not sex-based when done to one. To the *Barnes* court, the plaintiff's allegations were sex-based due to "the fact that [defendant] imposed upon her...a condition which ostensibly he would not have fastened upon a male employee." *Barnes*, 561 F.2d at 989 n.49. "Ostensibly" meaning, on the facts alleged. As the *Barnes* court further clarified, "Appellant flatly claims that but for her gender she would not have been importuned, *and nothing to the contrary has as yet appeared*, and there is no suggestion that appellant's allegedly amorous supervisor is other than heterosexual. *These are matters for proof at trial....*" *Id.* (emphasis added). In *Bundy*, the D.C. Circuit glossed this formulation, considering same-sex as well as opposite-sex harassment: "in each instance the question is one of but-for causation: would the complaining employee have suffered the harassment had he or she been of a different gender?" *Bundy*, 641 F.2d at 942 n.7. In other words, the conceptual possibility of bisexual or homosexual harassment was not allowed to preclude a trial on the facts of heterosexual harassment, in this case, of a woman by a man.

Later courts followed the "but for sex" test in case after case of male-on-female harassment. *See, e.g., Jones v. Flagship Int'l.*, 793 F.2d 714, 719 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987); *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 784 (1st Cir. 1990); *Stewart v. Weis Markets, Inc.*, 890 F. Supp. 382, 390 (M.D. Pa. 1995). The widely followed opinion in *Henson* formulated it: "In the typical case in which a male supervisor makes sexual overtures to a female worker, it is obvious that the supervisor did not treat male employees in a similar fashion. It will therefore be a simple matter for the

plaintiff to prove that but for her sex, she would not have been subjected to sexual harassment." *Henson*, 682 F.2d at 904 (citing *Bundy*, 641 F.2d at 942 n.7). Why "obvious"? Do courts assume that if behavior is heterosexual, it is gendered? They may. But there was no allegation to the contrary. Nothing else appearing, courts infer that the behavior is gender-based as heterosexuality is gender-based.

Denials of facial challenges in the same-sex harassment context have taken the same approach: factual. *Wehrle v. Office Depot, Inc.*, 954 F. Supp. 234, 236 (W.D. Okla. 1996) (male-on-male, gender basis is issue of fact for trial); *Gerd v. United Parcel Serv., Inc.*, 934 F. Supp. 357, 361 (D. Colo. 1996) (male-on-male, motive and causation "tend to be fact specific and should not be resolved under Fed.R.Civ.P. 12").

Some judges believe that opposite-sex harassment cases make knowing that the behavior is sex-based relatively easy, while same-sex cases make it comparatively hard. *Hopkins*, 77 F.3d at 753-54 ("ambiguously sexual innuendos" at 754). *Amici* disagree. The facts are no more likely to be clear or murky in same-sex than in opposite-sex cases. The view that opposite-sex settings are easily gendered while same-sex settings are not reflects a presumption of heterosexuality. Correctly understood, the same tests developed to determine whether harassment is gender-based in cases between women and men—is it sexual? is one sex harmed?—apply equally in cases between women and between men.

### 2. Aggression That Is Sexual Has Been Treated by Courts as Facially Sex-Based.

Sexuality is gendered in societies of sex inequality. *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 126-131 (1989); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 182-183 (1979). As a result, for better or worse, in most instances "[i]t is the essence of sexual conduct between two individuals that the one initiating or inviting the conduct normally does so because of the other's sex." *Tietgen*, 921 F. Supp. at 1500-01.



Courts adjudicating sexual harassment claims reflect this state of affairs when they unproblematically consider that *sexual* allegations are gender-based allegations. "Sexual harassment is *ordinarily* based on sex. What else could it be based on?" *Nichols*, 42 F.3d at 511 (emphasis in original). *See also Michael M. v. Super. Ct. of Sonoma County*, 450 U.S. 464 (1981) (statutory rape law on "intercourse" treated as facially sex-based).

Without requiring genital proof, courts routinely deem opposite-sex harassment "unquestionably based on gender," *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 806 n.2 (5th Cir. 1996), simply because the facts alleged are sexual facts. Thus, for example, from facts of "sex-based opprobrium," "statements implying that her sexual charms had something to do with sales," and "constant lectures pertaining to her sex life," the conclusion is drawn than an environment is sex biased. *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir. 1982). The Third Circuit observed, "[T]he intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexually derogatory language is implicit, and thus should be recognized as a matter of course." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990).[3] Sexuality is so obviously gendered that courts have sometimes felt the need to stress that sexuality isn't *all* there is to Title VII's gender-harassment prohibition. *See, e.g., Hall v. Gus Constr. Co., Inc.*, 842 F.2d 1010, 1014 (8th Cir. 1988). Courts have properly rejected out of hand the argument that sexual initiatives by a man to a woman were not gender-based because "his actions were merely the result of his desire for King as an individual and, therefore, were not sex-based harassment." *King v. Bd. of Regents of the Univ. of Wis. Sys.*, 898 F.2d 533, 538 (7th Cir. 1990). Persons are sexually gendered as individuals.

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[3] That sexual allegations are facially gender-based would be a good reason that no separate proof of intent or motive going to "basis in sex" has generally been required in sexual harassment cases.

The view "if it's sexual, it's gendered" has also guided same-sex cases. In one male-on-male case, "[t]he earnest sexual solicitation alleged...provides a firm basis for the inference that [plaintiff] was harassed because of his gender." *Tietgen*, 921 F. Supp. at 1502. In another, statements referring to male-on-male fellatio and gestures indicating sex with a penis meant that "the very nature of the conduct alleged raises the inference that Hamill directed his behavior at the plaintiff because he was male." *King*, 959 F. Supp. at 66.

The underlying question of whether impugned treatment is or is not sexual is itself a question of fact—subtle at times, often anything but. Sexually speaking, two men saying "we're going to fuck you" and one pulling out his penis, Dep. at 58:23-24, 57, is hardly subtle. Behavior can be hostile, produce anguish or distress (and intend to), *King*, 898 F.2d at 539-40, or aim to demean, *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 471-72, 482 (5th Cir. 1989), and still be sexual. Producing fear in another, or abusing power, *see Horn v. Duke Homes*, 755 F.2d 599, 601-603 (7th Cir. 1985) (defendant used supervisory power to fulfill his sexual desires), can be sexually arousing or potentiating to the perpetrator. *See generally E.E.O.C. v. Farmer Brothers Co.*, 31 F.3d 891, 897-98 (9th Cir. 1994) (discussing motives).

But the genders of the perpetrator and the victim do not dispose of whether a given behavior is sexual or not. One cannot presume that behavior that is sexual in opposite-sex contexts is not sexual in same-sex contexts, as Judge Neimeyer does in *Hopkins*, 77 F.3d at 752-53. Just as acts do not automatically become sexual simply because they are engaged in by members of different sexes, acts do not become nonsexual simply because they are engaged in by members of the same sex. No differential presumptions are appropriate.

### 3. Harassment Is Sex-Discriminatory When Sexual and One Sex Is Victimized.

Concurring in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), a case of male-on-female sexual harassment, Justice Ginsburg clarified that, in proving discrimination based on



sex as required in *Meritor*, 477 U.S. at 66, "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring) (citation omitted). The E.E.O.C.'s directive on same-sex harassment uses precisely these terms: "The victim does not have to be of the opposite sex of the harasser. Since sexual harassment is a form of sexual discrimination, the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex." 2 EEOC Compliance Manual §615.2(b)(3) (1974 & Supp. 1996). Same-sex harassment courts have applied this "singles out one sex" rule with no difficulty. *See, e.g., Raney v. Dist. of Columbia*, 892 F. Supp. 283, 287-88 (D.D.C. 1995); *Griffith v. Keystone Steel & Wire*, 887 F. Supp. 1133, 1137 (C.D. Ill. 1995). Counting heads across the gender line may not capture every sex-based disparity, but only one sex is harmed in every federally reported sexual harassment case to date.

Although not a question raised by this appeal, even when both sexes are victimized by sexual harassment, sex discrimination can result, some dicta to the contrary notwithstanding. The so-called bisexual harasser, eluding equality snares by indiscriminately sexually harassing men and women alike,[4] stalks the judicial imagination, cutting quite a figure in legal hypotheticals.[5] But in more than twenty years, an actual

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[4] It should not be assumed that gender plays no role in bisexuals' choice of sexual partners.

[5] The *Barnes* court distinguished the heterosexual and same-sex harasser from the bisexual superior, for whom "the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike." *Barnes*, 561 F.2d at 990 n.55. *Accord, Bundy*, 641 F.2d at 942 n.7 (same). Several subsequent courts have made similar statements, none on facts before them. *Henson*, 682 F.2d at 904; *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1016 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); *Vinson v. Taylor*, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting), *aff'd*,

*(Footnote continued)*

equal-opportunity harasser has yet to be sighted in federal court.[6] It is settled law in sexual harassment cases that (1) plaintiff must allege one sex is harmed to state a legally sufficient *prima facie* case; (2) defendant must plead and prove the defense that both sexes are harmed, not raise it as a defect in law pre-trial; and (3) to prevail, the harm must be proven to be actually equal. Nothing in the same-sex context disturbs these resolutions.

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*Meritor*, *supra*; and *Ryczek v. Guest Services, Inc.*, 877 F. Supp. 754, 762 (D.D.C. 1995).

[6] While equal discrimination is a clear oxymoron, *see Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525, 541 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1044 (1996), this Court's constitutional sex equality jurisprudence recognizes that both sexes can be discriminated against based on sex at the same time from a single practice. *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980). Yet to *amici*'s knowledge, the federal courts have never yet found it to be in a sexual harassment context. *Steiner*, *supra*, came closest, but the Ninth Circuit saw through it, observing that "while [defendant's] abuse of men in no way related to their gender, his abuse of female employees...centered on the fact that they were females." *Steiner*, 25 F.3d at 1464. So did the Eighth Circuit in finding that "a fact-finder could conclude that Albaghdadi's treatment of women is worse than his treatment of men[,]" so the claim was gender-based. *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264, 269 (8th Cir. 1993). Chief Judge Posner disavowed the practical effect in dicta: "It would be exceedingly perverse if a male worker could buy his supervisors and his company immunity from Title VII liability by taking care to harass sexually an occasional male worker, although his preferred targets were female." *McDonnell v. Cisneros*, 84 F.3d 256, 260 (7th Cir. 1996). *See Waltman*, 875 F.2d at 477 n.3 (rejecting "equal offensiveness" defense on facts); *Wyerick v. Bayou Steel Corp.*, 887 F.2d 1271, 1275 (5th Cir. 1989) (same); *Hutchison v. Amateur Elec. Supply, Inc.*, 42 F.3d 1037, 1043 (7th Cir. 1994). *See also King*, 911 F. Supp. 161 (E.D. Pa. 1995) (woman's claim against company for sexual harassment by both woman and man found sex-based).



### C. Neither the Rights of Victims Nor the Liabilities of Perpetrators of Sexual Harassment Should Turn on Their Sexual Orientation.

The sexual orientation of the parties inevitably arises in,[7] and is implicated in ruling on, same-sex harassment. The sexual orientation of the parties is, however, properly irrelevant to the legal sufficiency of sexual harassment claims. An accused perpetrator's being gay or lesbian does not make that person's behavior sex-based, but sexual orientation may be pertinent in determining whether particular behavior is based on sex, *see Doe* at *20-*21, in the totality of the circumstances.

#### 1. Access to Sex Equality Relief for Acts of Sexual Abuse Depends on the Acts, Not on the Sexual Preference of the Actors.

*Wright v. Methodist Youth Services*, 511 F. Supp. 307 (N.D. Ill. 1981), the first reported case of same-sex sexual harassment, held that a man fired because he rejected the sexual advances of his male supervisor stated a claim for sex discrimination under Title VII. *Wright* described the behavior as "homosexual advances," *id.* at 308, 309, although so far as is known, most men who sexually abuse other men are heterosexual. *Scarce* at 17 (summarizing results of 14 empirical studies at 15). The *Wright* ruling thus established that same-sex sexual advances were sex-based within the meaning of Title VII in a context that linked that result to the sexual preference of the perpetrator.

The emerging rule is to regard sexual orientation as not determinative of the legal sufficiency of same-sex claims as a

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[7] "I feel that they made homosexual advances toward me. I feel they are homosexuals." Dep. at 41:23-24. The Fifth Circuit described the threats to Oncale as "threats of homosexual rape" but did not address sexual orientation, *Oncale*, 63 F.3d at 118, nor do the certified questions in this case state an issue of homosexuality as such.

matter of law but to admit it as relevant on the facts. Perpetrator sexual orientation does not make unwanted sexual initiatives sex-based any more than victim sexual orientation makes unwanted advances welcome, although both can be relevant (if sometimes only minimally) to both factual determinations. *See Yeary*, 107 F.3d at 447-48. It is not categorically irrelevant because "[w]hen a homosexual supervisor is making offensive sexual advances to a subordinate of the same sex, and not doing so to employees of the opposite sex, it absolutely is a situation where, but for the subordinate's sex, he would not be subjected to that treatment." *E.E.O.C. v. Walden Book Co., Inc.*, 885 F. Supp. 1100, 1103-1104 (M.D. Tenn. 1995); *Tanner v. Prima Donna Resorts, Inc.*, 919 F. Supp. 351, 355 (D. Nev. 1996) (sexual preference of the harasser irrelevant to summary determination). *See also Vandeventer*, 887 F. Supp. at 1180. Although care must be taken that this approach does not create an opening for homophobic attacks, the rule itself merely applies the same standard to everyone.

Sexual orientation on its face disposes of nothing. Gay men do not initiate unwanted sex to all men any more than lesbian women welcome sexual attention from all women. Needless to say, from knowing a person is gay, one cannot deduce that they sexually harassed another person. But the fact that a perpetrator of same-sex harassment is not gay—or not known to be gay or proveably gay—also does not render same-sex sexual behavior *not* sex-based. Thus the Fourth Circuit's view that same-sex sexual harassment by heterosexual men cannot be sex-based, *McWilliams*, 90 F.3d at 1194-1195, but harassment by homosexual men can be, *Wrightson*, 99 F.3d at 143, is wrong on many grounds. Those boys who were just boys in the machine shop in *McWilliams* became sexual and gendered when they ran the restaurant in *Wrightson*? Beyond misreading social reality, the Fourth Circuit approach is impractical (courts are now to adjudicate a person's "real" sexual orientation?), incoherent (a victim's recovery for sexual abuse depends on what the perpetrator does with voluntary others?), and invidious (heterosexuals may sexually abuse people whom homosexuals may not?). On the Fourth Circuit's view,



if a plaintiff could prove that one of the "baggers" in *Quick* actually "is" gay, would his testicle-grabbing become sex-based, while the identical act of the straight coworker next to him is not?

By definition, sexual harassment is unwanted, so victim sexual orientation is as irrelevant on same-sex facial challenges on sex-basis as it is on opposite-sex ones. The sexual orientation of the victim cannot convert aggression that is sex-based into aggression that is not, or vice-versa.

Will Title VII access now turn on the sexual feelings and imagined or real sexual identities of perpetrators? Will it have one sexual harassment rule for gay sexual harassers and another for straight ones? one for those whose sexual feelings have coalesced, another for those whose sexual feelings are diverse, diffuse, denied, deniable, unknown, or simply unproveable? Oncale sued for forced sex. Why should the gender of those with whom Lyons and Pippen are sexual, when others want to be sexual with them, determine Oncale's rights against them for violating (what is conventionally considered) his manhood?

### 2. Harassment Because of Homosexuality Is Harassment Because of Sex.

In practical terms, harassment because of homosexuality cannot be separated from harassment because of sex. The gender of sexual object choice (although not all there is to sexual orientation) partly defines gender in society. The gender of a person with whom one has sex, or is thought to have sex, is a powerful constituent of whether one is considered a woman or a man in society. *See generally* JUDITH LORBER, PARADOXES OF GENDER 55-79 (1994).

The pitfalls of trying to separate the two are illustrated by *Dillon*. Mr. Dillon was taunted, ostracized, and physically beaten by coworkers because they believed he was gay. They called him "fag" and other terms of homophobic abuse, he said, because he was a man. The Sixth Circuit, admitting his harassment was "clearly sexual in nature," *Dillon*, 1992 WL

5436 at *6, rejected his Title VII claim, saying it was because of homosexuality not sex. So far as is discernible in the opinion, Mr. Dillon is heterosexual. In the view of *amici*, he was harassed as a male. Women are not called "fag." When women are seen as effeminate, they are rewarded, or sexually harassed in ways clearly marked as sex-specific. Dillon should not have had to prove facts that did not exist, such as that "his coworkers *would have* treated a similarly situated woman...differently," or to argue that "a lesbian *would have* been accepted." *Id.* at *9. Hypothetical counterfactuals cannot be proven. That the behavior was sexual, and that no women *were*, in fact, subjected to it (supported in Dillon's case by evidence of clearly homophobic attacks) should be enough.

Only men are subject to denigration by gay-bashing taunts like "faggot." Only women are subject to denigration by the use of terms like "dyke" as epithet and insult. Such abuse is inherently socially gendered. Using sex with members of one's own sex as derision, insult, and hostility denigrates the target's gender-adequacy. Such terms, when part of sexual harassment, create a hostile environment for men *as men* and for women *as women*, whether directed at straights or gays. Because they attack individuals as members of their gender group, they are based on sex.

Separating sexuality from gender, hence harassment due to gender from harassment due to sexual orientation, is impractical and would lead to anomalous results, as *Valadez v. Uncle Julio's of Ill., Inc.*, 895 F. Supp. 1008 (N.D. Ill. 1995), illustrates. The male defendant had "crudely discussed his desire to engage in sexual activities with [lesbian] plaintiff and other female employees, both lesbian and non-lesbian." *Valadez*, 895 F. Supp. at 1014. He made advances "to plaintiff...because she was a woman as well as a lesbian." *Id.* He made such comments to other women, lesbians and nonlesbians, and no men. The court found this conduct gender-based. It did not find defendant's advances to straight women actionable as sex-based and those to lesbian women not actionable as based on sexual orientation. As the *Valadez* court perceptively noted, "defendant argues that because [he] was aroused



by the fact that plaintiff is a lesbian his subsequent conduct is not actionable. Whether plaintiff would have enjoyed having sex with [him] is not the issue." *Id.* The advances were doubly gender-based: because she is a woman, and because she is a woman who loves women. Disallowing such claims will, as a practical matter, leave lesbian women often without recourse.

Although this appeal does not require resolution of the question, *amici* submit that sexual harassment because of sexual orientation is sex-based discrimination. When individuals are sexually harassed because of the sex of their sexual partners, real or imagined, they are harassed because of sex. First, formally speaking, those harassed because they are gay men or lesbian women are harassed because of the *gender* of their sexual partners and identification. If their own gender, or that of their loved ones, were different, they would not be so treated. They are precisely similarly situated to heterosexuals in having sexual relationships *based on gender* yet are treated differently because of their own gender, the gender of their sexual partners, or both. *See Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (Sup. Ct. Haw. 1994) (prohibition on same-sex marriage prohibited sex classification under Hawaii Constitution); *Engel v. Worthington*, 23 Cal. Rptr. 2d 329 (Ct. App. Cal. 1994) (unpublished). *See* ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 153-158 (1996). Second, more substantively, gay men and lesbian women, through challenging the naturalness and inevitability of gendered-unequal roles in sex, challenge the sexual dimension of gender inequality under which sexual violence by men against women, and some men, is widespread. BUREAU OF JUSTICE STATISTICS 1994 NATIONAL CRIME VICTIMIZATION SURVEY, BUREAU OF JUSTICE STATISTICS BULLETIN 4 (1996) (5% of rapes reported to survey of victims age 12 and over are of men).

Third, usually *both* gay men and lesbian women are not sexually harassed by the same harasser. Equal oppression—discrimination seen as based not on gender but on sexual orientation, hence not covered, *DeSantis v. Pac. Tel. & Tel. Co. Inc.*, 608 F.2d 327 (9th Cir. 1979), however misguidedly—

may occur in this context scarcely more often than bisexual harassment appears to. In any case, sex equality rights are individual rights. It is no answer to victimization based on the supposed gender-inappropriateness of one's sexuality that others of another sex who make the corresponding "error" are also discriminated against. Equal discrimination in this sense is sex discrimination two times over, not no discrimination at all.

## III. THE EQUAL PROTECTION CLAUSE FORBIDS EXEMPTING SAME-SEX HARASSMENT CLAIMS FROM TITLE VII COVERAGE.

The Fifth Circuit's approach in *Oncale* creates a blatant double standard in sexual harassment cases based on gender, and potentially on sexual orientation as well, that denies survivors equal protection of the laws. Men are denied legal protection women have. Under the Fourth Circuit's extension, straight perpetrators can freely commit sexual aggression for which gay perpetrators are held accountable. And because sexual harassment due to sexual orientation, wrongly, is regarded as not covered by Title VII, *DeSantis*, 608 F.2d at 329-30; *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084-85 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985), some courts have concluded that "Title VII does not protect homosexuals from harassment...since such treatment arises from their affectional preference rather than their sex." *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135, 139 n.2 (S.D. Tex. 1993).

A dual system of rights on an arbitrary ground violates every equal protection standard known. The Constitution "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (*quoted with approval, Romer v. Evans*, 116 S. Ct. 1620, 1623 (1996). Surely, if officially ignoring men's complaints of sexual harassment while taking women's seriously violates the sex equality component of the Equal Protection Clause, *Nabozny*, 92 F.3d at 456 (school must "give male and female



students equivalent levels of protection"); and of Title VII, *Madon v. Laconia School District*, 952 F. Supp. 44, 47-48 (D.N.H. 1996) (school ignoring complaint of anal groping of teacher by principal is sex-based); and of Title IX, *Yusef v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994), judicially interpreting Title VII to ignore men's complaints of sexual abuse by men, while allowing women's complaints of sexual abuse by men, does as well. And this Court taught in *Romer* that homosexuals, as such, may not be excluded from the ordinary civil processes for asserting their rights that are available to everyone else.

Without question, "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to [another] person[.] *Bakke*, 438 U.S. at 289-290 (Powell, J., with whom White, J., joined). But the parallel between this case and the "reverse discrimination" cases—advanced by the Eleventh Circuit in *Fredette*, 112 F.3d at 1509, and adopted in *Storey v. Chase Bankcard Services*, 1997 WL 414730, at *6 (D. Ariz., July 21, 1997)—is more formal than substantive. Those who claim "reverse discrimination" say they are treated the way the historically powerless are treated. However, affirmative action designed to redress and end arbitrary social exclusion and white/male supremacy, *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971), *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987), does not violate the legal equality rights of individual members of socially dominant groups who thereby lose their customary group-based privileges. *But cf. Hopwood v. Univ. of Tex.*, 84 F.3d 720 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996). At the same time, it would be perverse to allow members of dominant groups to use equality laws to reassert their dominance while denying access to equality relief to individual members of dominant groups who *fail* to meet their group's standard for dominance and/or *are* treated like members of historically powerless groups are so often treated.

*Oncale* presents a real, not imagined, a direct, not reverse, act of discrimination based on sex. It cannot be the case that

whites, wrongly claiming racism, can destroy equality programs for people of color while sexually assaulted men, rightly claiming sexism, cannot sue their victimizers. And far from undermining the rights of those who most often need the claim, allowing Oncale to sue under Title VII not only takes nothing from them but, by reducing the stigma of sexual assault and increasing accountability for it, benefits all sexual abuse survivors.

Much sexual harassment jurisprudence reasons that, had a sexually harassed woman been a man, she would not have been so treated, therefore she is harassed "because of sex." The present case poses the question, What if she had been a man and the same thing happened? The answer is at once sex-specific and sex-neutral: both sexes are covered for injuries through their gender. Women do not have sex equality rights only because men couldn't be treated in the same way, this case suggests, but because men could be and are not. And when they are? Had he been a woman, Mr. Oncale might not have been treated the way he was. But if he were, his sex equality rights would be recognized.

## CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Fifth Circuit should be reversed and the cause remanded for trial on the merits.

Respectfully submitted,

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August 11, 1997

# APPENDIX A

## Appendix A

## DESCRIPTIONS OF *AMICI CURIAE*

NATIONAL ORGANIZATION ON MALE SEXUAL VICTIMIZATION, INC. (NOMSV), founded in 1988 and incorporated in 1995, is a nonprofit membership organization of diverse individuals, committed through research, education, advocacy, and activism to the prevention, treatment, and elimination of all forms of sexual victimization of boys and men. The organization, which has members from throughout the United States and Canada, includes both male survivors of sexual abuse and professionals who work with this issue.

NOMSV believes that sexual harassment, homophobia, and male privilege to engage in violent/aggressive behaviors are all norms that contribute to a social context that breeds sexual abuse. In particular, NOMSV believes, same-sex sexual harassment without effective legal recourse creates a norm that perpetuates the victimization of males.

NOMSV has an interest in the outcome of the *Oncale* case because it involves the sexual victimization of a male, because NOMSV is intent on stopping such abusive incidents from occurring, and because NOMSV is committed to changing social norms that contribute to such incidents. These goals would be served, NOMSV believes, by permitting Joseph Oncale to sue his perpetrators under Title VII.

MEN STOPPING RAPE, INC. (MSR), founded in 1983 in Madison, Wisconsin, is a community-based group of men seeking ways to end masculine violence. MSR provides information and speakers, facilitates workshops, and distributes educational materials. MSR's message to men is that the sexual assault of females *and* males, and an entire continuum of attitudes and behaviors supporting it, are critical issues for men to address. MSR is committed to educating men because it believes that only as young males learn to expect safety for themselves can they be expected to respect the same rights for other men and for women.

In MSR's discussions of male socialization, many boys and men, beginning to realize the underlying connection of sexual assault to power, have identified their own experiences of having been assaulted, mostly by other males. Through MSR's rape-prevention education work in all-male environments such as prep schools, fraternities, sports teams, juvenile and adult prisons, and military academies, MSR has found that there are many male survivors of incest or other sexual abuse. Some fraternity initiations are sexual assaults, and sexual assault is used as "punishment" in athletic teams and the military. MSR believes that sexual assault of females will not end until the sexual assault of males is also addressed. Clearly defining sexual violence by men against men (and by women against women) as a practice of sex-based discrimination, as *Oncale* seeks to do, would promote this goal.

OAKLAND MEN'S PROJECT, INC. (OMP), was started in Oakland, California, in 1979 as a community education program to stop men's violence. OMP is a nationally recognized program dedicated to helping people understand the roots of violence, and to building alliances across lines of gender, race, sexual orientation, and age. As a multicultural men's nonprofit agency, it conducts community organizing and violence-prevention education and training for schools and state and national institutions and organizations. Publications include *Making the Peace* (Hunter House, 1997), a violence-prevention curriculum for young people, now being conducted as a program at urban and rural sites throughout California and across the United States.

OMP is interested in the outcome of the *Oncale* case because of OMP's commitment to intervene in and prevent men's violence, in particular physical and sexual violence against women and against other men. OMP understands this violence to be connected to male socialization—the training of boys and young men to "act like a man." The clearest effect of this socialization is the re-creation, generation by generation, of gender inequality and harassment, discrimination, domination, and other forms of violence among men. As a multicultural men's organization, we have conducted



violence-prevention trainings for nearly 20 years, currently reaching 5,000 youth and adults per year; we know from our trainings, and from our own lives, the profound effects of socialization and resultant forms of sexual and physical harassment. The *Oncale* case offers a chance for legal recourse for male victims of sexual abuse from other men, while pointing out the common sources of the sexual harassment of both women *and* men by men.

MEN AGAINST PORNOGRAPHY (MAP), a nonprofit organization located in New York City and founded in 19[illegible], develops and distributes educational materials and workshops for men about how pornography negatively affects their attitudes and behavior as men. MAP encourages men to become involved in helping to create sex equality. MAP recognizes that male-against-male violence and male-against-female violence are closely related phenomena—both in survivors' experience of subordination and aggressors' gendered motivation to dominate. In the *Oncale* case, MAP seeks to further the legal recognition that violence of men against men, like violence of men against women, is a product of a social system of gender hierarchy in which men dominate others who are less powerful.

SEXUAL EXPLOITATION EDUCATION PROJECT, INC. (SEEP), is a nonprofit organization in Portland, Oregon, whose primary purpose is to provide community education about sexual exploitation and, specifically, men's accountability in stopping it.

Sexual harassment, like other kinds of sexual exploitation, is predominately a form of men's violence against women. It is discrimination based on sex and it is about the societal power men have over women. Men sexually harass women in order to prove their manhood to themselves and their peers. This type of male sexual identity is based on dominance; the gender of the recipient of the abuse doesn't change that. *Oncale v. Sundowner* brings to our attention as a nation the reality that men sexually subordinate other men as well as women. Many times, in fact, SEEP has found that the all-male peer group is a training ground for men. It's where males learn, by assaultive and

sexualized humiliations of each other, how to treat women in a world where to not be a real man is to be less than nobody.

SEEP provides educational presentations to over 4,000 middle and high school students each year in the Portland area concerning sexual harassment, date rape, dating violence, and prostitution/pornography. From experience doing this violence-prevention work with young people, SEEP sees again and again how men's sexual subordination of men is fundamentally connected to men's sexual subordination of women. It is SEEP's position that the law should protect all recipients of sexual harassment, regardless of gender. If it does not, if we tacitly condone male-on-male sexual harassment by not affording men the equal protection of the law, we will never be able to eliminate men's violence against each other and subsequently against women.

MEN OVERCOMING SEXUAL ASSAULT (MOSA) is a project of BAY AREA WOMEN AGAINST RAPE, INC. (BAWAR). The nation's first rape-crisis center (incorporated in 1971), BAWAR is a private, nonprofit organization whose mission is to empower, support, intervene on behalf of, and advocate for sexual assault survivors and their significant others.

Current statistics show that one in ten men will be sexually assaulted as adults. For many survivors, isolation and shame make seeking help difficult; for male survivors this withdrawal may be heightened by the perception that rape-crisis counseling is available only for women and by the misperception that only gay or bisexual men are assaulted. BAWAR began the MOSA project to provide male survivors of sexual assault with a supportive context for dealing with the issues they face, regardless of sexual orientation. As part of BAWAR's commitment, through MOSA, to assist survivors of male-on-male assault, BAWAR has an interest in the legal recognition of male-on-male sexual harassment as a civil-rights violation.

STOP PRISONER RAPE, INC. (SPR), is a national nonprofit organization dedicated to combating the rape of male and female prisoners and to helping survivors of jailhouse rape.



It is estimated that 80,000 unwanted sexual acts take place behind bars in the United States every day, with a total of 364,000 prisoners raped every year. Most male victims are young, small, nonviolent, unable to defend themselves against ruthless exploitation. Full of rage and lacking psychological treatment for Rape Trauma Syndrome, they typically return to the community far more violent and antisocial than before they were raped, and some become rapists themselves in a misguided attempt to "regain their manhood."

The purposes of SPR are to provide education, information, and advocacy at all levels with regard to this ongoing nightmare of sexual assault and enslavement; to provide encouragement, advice, counseling, and legal support to survivors; to train the staff who must deal with them; and to combat this systematic and cyclic horror in every way possible.

SPR is interested in the *Oncale* case because SPR is opposed to male-on-male sexual assault no matter where it takes place.

MEN OVERCOMING VIOLENCE, INC. (MOVE), a nonprofit organization in San Francisco, California, works to end male relationship violence, challenges attitudes and beliefs that perpetuate that violence, and promotes a cooperative, nonabusive model of masculinity. To accomplish this, MOVE provides counseling for adult and adolescent batterers, reeducation, professional training, community education, and advocacy for change in public policy.

Since 1980, MOVE has called on Bay Area men to take responsibility for, and to cease, their violent behavior. The main principle governing MOVE's work is that most men's abusive behavior is learned, and is not the result of inherent traits or psychological disorders.

Through its work, MOVE has come to understand men's relationship violence as involving destructive patterns of power, domination, and control. In joining the *Oncale* case, MOVE seeks to further the recognition and elimination of pernicious societal patterns that reward male power and control over others who are perceived as less powerful.

COMMUNITY UNITED AGAINST VIOLENCE, INC. (CUAV), is a community-based organization dedicated to creating an environment free of violence and oppression for the lesbian, gay, bisexual, and transgender communities of San Francisco. Toward that end, CUAV develops programs and services to empower and protect these communities' dignity, identity, and individual rights and to promote their safety and self-determination.

Founded in 1979, CUAV offers a range of programs for survivors of hate and domestic violence, including a crisis line; counseling; referrals; advocacy in the justice, medical, and mental-health systems and with other service providers. CUAV also provides extensive educational programs and trainings on homophobia, violence, personal safety awareness, and self-defense.

CUAV understands violence to be a manifestation of hatred, bigotry, ignorance, and fear. As part of its educational and outreach work, CUAV collects, analyzes, and disseminates statistics and other information about homophobic hate violence and same-sex partner violence in order to advocate to effect positive legal protection and civil rights. It also provides legal services to survivors of hate crimes, harassment, and domestic violence.

CUAV joins this *amicus* brief in support of Joseph Oncale out of the long-standing conviction underlying its activities that hateful aggression against individuals on account of their sex or sexual orientation cannot be excused or exonerated on any ground and that justice and empowerment require that survivors have access to civil amelioration against perpetrators without regard to the sex or sexual orientation of either person.

EMERGE: A MEN'S COUNSELING SERVICE ON DOMESTIC VIOLENCE, INC., founded in 1977 in Boston, is the nation's first counseling program for men who batter and the largest such program in New England. Emerge is committed to helping men to confront and take responsibility for their abusive behavior. Emerge has learned from many experts on domestic violence and sexual assault that the psychological and



economic impact of such treatment is usually devastating and long-lasting, regardless of the gender of the victims.

Recognizing that the usual targets of abusive behavior are women, Emerge believes that neither gender should be subjected to physical assault, sexual and verbal degradation, and terroristic behavior such as occurred in the *Oncale v. Sundowner* case. Such egregious behavior in a work setting is no less terrifying and humiliating to men than it is to women. These injuries can be prevented, Emerge believes, only if companies are held accountable for tolerating gender-based violence and harassment against their employees.

MEN STOPPING VIOLENCE, INC. (MSV), founded in 1982 in Atlanta, Georgia, is a nonprofit organization dedicated to ending violence against women. Its focus is to stop battering, and its intention is to work toward ending rape and incest.

As MSV works to help men change their abusive behavior, MSV recognizes that individual change is dependent upon changing social systems that support the private and institutional oppression of women. MSV believes that groups of men can work together to change patriarchal values and belief systems that oppress women and children and dehumanize men themselves. In this struggle, MSV looks to, and supports the work of, the battered-women's movement. Believing that all forms of oppression reinforce one another, MSV also seeks to confront power hierarchies that are based on race, class, or sexual orientation.

MSV believes that men's violence against women has its roots in men's contempt for women, which is both learned and expressed through verbal insults—such as "sissy," "pussy," "mama's boy," "henpecked," "throws like a girl"—by which men classify other men as women, hence sexual or gender inferiors. The work to end men's violence against women is strengthened by acknowledging the connection between men's contempt for women and men's assaults on men—a connection that allowing Joseph Oncale to sue for sexual harassment would clearly promote.

MEN'S RAPE PREVENTION PROJECT, INC. (MRPP), a nonprofit educational organization in Washington, D.C., works to prevent rape and other forms of male violence through community education, consulting, research, and public action. MRPP supports men by providing them with the resources and opportunities to challenge themselves and others to end sexual violence. MRPP urges men to recognize their collective capacity to prevent sexual violence in order to join with women in building a rape-free society.

MRPP recognizes that there are complex relationships between sexist violence and other often violent forms of oppression, such as racism and homophobia. By confronting these institutions—and by supporting legal means of holding men accountable for their sexual violence against other men as well as against women, as the *Oncale* case would do—MRPP believes men will make a dramatic statement about their commitment to living peacefully in a world based on equality and free choice rather than privilege and coercion.

NEW YORK CITY GAY & LESBIAN ANTI-VIOLENCE PROJECT, INC. (AVP), a crime-victim-assistance agency founded in 1980, is the only organization in New York that specifically serves lesbian, gay, bisexual, and transgender survivors of sexual assault, domestic violence, hate crimes, and other forms of criminal victimization. In addition to documenting these crimes, AVP provides a twenty-four-hour crisis-intervention hotline; peer and group counseling; accompaniment to and advocacy with police, the courts, and other service providers; information and referrals. AVP serves the larger community by working to change public attitudes that tolerate, insulate, or instigate hate-motivated crime, and to reform government policies and practices affecting lesbian, gay, and other survivors of crime.

AVP recognizes that rape and sexual assault can happen to anyone, including men, regardless of their race, class, age, size, appearance, or sexual orientation. AVP considers sexual assault to occur any time either a stranger or someone known touches any parts of a person's body in a sexual way, directly or through clothing, when that person does not want it. And



AVP considers rape to be any kind of sexual assault that involves the forced penetration of the anus or mouth, even partially, by a penis or other object. AVP believes that rape and sexual assault, like any other forms of violence, are used to exert power and control over another person and should be legally actionable by victims asserting their civil rights.

NATIONAL COALITION AGAINST SEXUAL ASSAULT, INC. (NCASA), is a nonprofit membership organization founded in 1978. NCASA's members include over 500 rape-crisis centers, sexual-assault-prevention programs, women's centers, individuals, and allied organizations. In recent years workshops at conferences have included topics on serving male survivors and the involvement of men in the anti-sexual-violence movement.

NCASA is a feminist organization that provides leadership to the movement to end sexual violence through advocacy, education, and public policy. NCASA's vision is to eliminate sexual assault and all forms of oppression. NCASA works to attain qualified services for victims/survivors and challenges the nation to commit to a rape-free culture.

NCASA holds an annual conference that addresses treatment, research, awareness, and program development. It publishes *NCASA News*, fact sheets, and public-policy updates. The information it circulates is based on survivor reports, expert literature, and NCASA oversight of the legal system. NCASA provides current, accurate, and comprehensive information to victim-service providers, public-policy makers, media, members, and the public.

NCASA's work to end sexual violence includes all forms of sexual violence, including against women, children, and men. Therefore, NCASA has a high interest in ensuring that legal prohibitions against sexual violence and sexual harassment apply to all victims/survivors, regardless of their gender or other characteristics.

# APPENDIX B

**Appendix B**

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

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No. 92-8533

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RICHARD A. GIDDENS, ET AL.,

Plaintiffs,

RICHARD A. GIDDENS,

Plaintiff-Appellant,
Cross-Appellee,

versus

SHELL OIL COMPANY,

Defendant-Appellee,
Cross-Appellant,

and

JACK TUCCI,

Defendant-Appellee.

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Appeals from the United States District Court
for the Western District of Texas

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(M-91-CV-98)

Before REAVLEY, DAVIS, Circuit Judges, and TRIMBLE,[1] District Judge.

PER CURIAM:[2]

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[1] District Judge of the Western District of Louisiana, sitting by designation.

[2] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and

*(Footnote continued)*

Our review of the record and the relevant law in this case persuades us that the district court correctly entered a take-nothing judgment against plaintiff, Richard Giddens.

Giddens failed to state a claim for relief under Title VII. Harassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination. Giddens did not allege how his employer treated him differently because he was a male and he produced no evidence at trial tending to prove such facts. The district court, therefore, correctly dismissed Giddens' Title VII action.

Giddens' action for negligent infliction of emotional distress and negligent hiring and supervision are barred by the Texas Workers' Compensation Act.

Giddens' claim for intentional infliction of emotional distress against Shell is precluded by the jury's finding that Tucci's acts were not committed in the course and scope of his employment.

We need not consider Giddens' claim for intentional infliction of emotional distress against Tucci, because Giddens has not complained about the district court's dismissal of his action against Tucci.

For these reasons, we affirm the judgment of the district court.

AFFIRMED.

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burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.